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IN THE

Supreme Court of the United States

October Term, 1962.

No. 924.

RALPH J. TAUSSIG and SALLY G. TAUSSIG, His Wife,
As Tenants by the Entireties,
Plaintiffs-Respondents,

v.

WELLINGTON FUND, INC.,
Defendant,

and

WELLINGTON EQUITY FUND, THE WELLINGTON COMPANY and WELLINGTON COMPANY, LTD.,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DANIEL MUNGALL, JR.,
1222 Western Saving Fund Bldg.,
Philadelphia 7, Pennsylvania,
Counsel for Petitioners.

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG,
Philadelphia, Pennsylvania.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Question Presented for Review	2
Statement of the Case	3
Reasons Relied on for the Allowance of the Writ	5
Argument	7
I. The Decision Herein Condemns a Proper and Widespread Practice in the Industry Which Has Been in Effect for Many Years	7
II. The Errors in the Reasoning of the Court of Appeals	9
III. The Conflict With the Decision by the Ninth Circuit	15
IV. Conclusion	16
Appendix	19

TABLE OF CASES CITED.

	Page
Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407 (2nd Cir. 1917)	7, 10
Walter Baker & Co. v. Slack, 130 Fed. 514 (7th Cir. 1904)	9
Fishel & Sons, Inc. v. Distinctive Jewelry Co., 196 App. Div. 779, 188 N. Y. Supp. 663 (App. Div. 1921)	10
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 60 L. Ed. 713 (1916)	7
S. C. Johnson & Son, Inc. v. Johnson, 175 F. 2d 176 (2nd Cir. 1949)	7, 10
Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp., 109 F. 2d 35 (D. C. Cir. 1939), cert. denied, 309 U. S. 684, 84 L. Ed. 1028 (1940)	14
The Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, Inc., 19 Del. Ch. 151, 164 Atl. 246 (1933)	9
Arthur Murray, Inc. v. Horst, 110 F. Supp. 678 (D. Mass. 1953)	10
S. E. C. v. Insurance Securities, Inc., 254 F. 2d 642 (9th Cir.), cert. denied, 358 U. S. 823, 3 L. Ed. 2d 64 (1958)	6, 15, 16

STATUTES AND AUTHORITIES CITED.

	Page
Investment Company Act of 1940, 15 U. S. C. § 80a:	
Generally	3, 5
§ 35(d)	5, 8
§ 36	15
Federal Trade Commission Act, 15 U. S. C. § 41	5
3 Restatement, Torts:	
§ 715, comment b	9
§ 716, comment a	9
§ 734	10
Securities Act of 1933, 15 U. S. C. § 77a	5
Securities Exchange Act of 1934, 15 U. S. C. § 78a	5
28 U. S. C. § 1254(1)	2

IN THE

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OCTOBER TERM, 1962.

No.

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, HIS WIFE, AS TENANTS BY THE ENTIRETIES,
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WELLINGTON FUND, INC.,
Defendant,

AND

WELLINGTON EQUITY FUND, THE WELLINGTON COMPANY AND WELLINGTON COMPANY, LTD.,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Wellington Equity Fund, The Wellington Company and Wellington Company, Ltd. pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW.

The Opinion of the Court of Appeals has not yet been reported and is printed in the Appendix hereto (19-36). The Opinion of the District Court is reported at 187 F. Supp. 189 (D. Del. 1961). It also appears at pages 452a through 527a of Volume I of the Appendix as printed for the use of the Court of Appeals, nine copies of which are filed herewith under the provisions of Rule 21.

JURISDICTION.

The judgment of the Court of Appeals is dated and was entered on January 23, 1963. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). There were no orders respecting a re-hearing or granting an extension of time within which to petition for certiorari.

QUESTION PRESENTED FOR REVIEW.

Does the industry practice of using similar names for two mutual funds (open end investment companies registered under the Investment Company Act of 1940) which utilize the services of the same investment adviser and distributor constitute unfair competition to the first mutual fund?

STATEMENT OF THE CASE.

This case involves Wellington Fund, Inc. and Wellington Equity Fund, Inc., which are mutual funds; The Wellington Company which was the investment adviser to Wellington Fund and the national distributor or sponsor of the shares of both funds; and Wellington Company, Ltd., the investment adviser to Wellington Equity Fund and an affiliate of The Wellington Company. From a functional standpoint, a mutual fund is a combination of many investment accounts into one large account thereby enabling the investors to obtain diversification and continuous professional investment management at modest cost. It continuously offers to sell additional shares and to redeem its outstanding shares, in each case at prices which are calculated on the current values of the portfolio securities. The investor thereby is able to terminate his hire of his professional investment management as easily as he engages it and he is assured of receiving at any time the current market value of his interest in the underlying portfolio.

Historically, mutual funds have been organized by investment advisers and counsellors who have desired to offer their services to investors through this medium. In almost all cases, the portfolio of the mutual fund is supervised by an investment advisory organization pursuant to a written contract which must meet the requirements of the Investment Company Act of 1940, 15 U. S. C. § 80a. The adviser is compensated periodically by a fee based upon a percentage of the assets under supervision. Additional investors are attracted to the fund by the efforts of a distributor or national wholesaler (the "sponsor") which is compensated by a commission paid by the investor upon the purchase of his shares. In most cases the investment adviser and sponsor are the same or affiliated companies.

In 1928, Walter L. Morgan, an investment adviser, organized a mutual fund named "Industrial and Power Securities Co." with the conservative investment objectives

of conservation of principal, reasonable income return and profits without undue risks. The fund's portfolio is invested in bonds and preferred and common stocks, and it is therefore known as a balanced fund. In 1931 Morgan's incorporated investment counselling business took the name "The Wellington Corporation". In 1935 Morgan caused the mutual fund to change its name to "Wellington Fund, Inc." Meanwhile, W. L. Morgan & Co., another corporation owned by Morgan, acted as sponsor for the shares of Wellington Fund. In 1952 it was decided to consolidate the adviser and sponsor. As a result, W. L. Morgan & Co. became the adviser as well as the sponsor of Wellington Fund and it changed its name to "The Wellington Company". The Wellington Corporation thereafter dissolved.

In 1958, at the urging of the investment dealers through whom Wellington Fund shares are sold at retail to the investing public, The Wellington Company organized a second mutual fund with the investment objective of long term growth of capital and income. With its primary emphasis on growth through common stocks, this fund involves correspondingly greater risks than Wellington Fund.

In accordance with the practice in the industry which has prevailed since 1932, The Wellington Company decided to use a name for the second fund which would identify the fund with the investment advisory and distribution services which had been made available to investors by means of Wellington Fund, and called the second fund "Wellington Equity Fund, Inc."

Two investors in Wellington Fund brought this derivative action charging that the use of the Wellington name by the second fund was unfair competition to the first fund. The District Court upheld this contention and issued an injunction (528a-592a). However, it denied monetary relief. Appeals by plaintiffs and defendants resulted in affirmance of the District Court.

The Complaint based jurisdiction of the unfair competition claim on diversity of citizenship. There were also

counts which charged that the acts of unfair competition violated the Securities Act of 1933, 15 U. S. C. § 77a, the Securities Exchange Act of 1934, 15 U. S. C. § 78a, the Investment Company Act of 1940, 15 U. S. C. § 80a, and the Federal Trade Commission Act, 15 U. S. C. § 41. After trial of the unfair competition claim, it developed that diversity of citizenship did not exist and Plaintiffs then relied upon principles of pendent jurisdiction as supporting jurisdiction of the common law claims. The District Court held that the claims of violation of the first three federal statutes were not sham or frivolous so that there was pendent jurisdiction of the common law claims (520a). Circuit Judges Kalodner and Hastie held that it was "legally debatable" that the rights asserted could be properly derived from the Investment Company Act of 1940 and upheld jurisdiction on the pendent jurisdiction principle (24-25). Circuit Judge Smith dissented on the ground that Section 35(d) of the Investment Company Act, which forbids the use of names which the Securities and Exchange Commission "finds and by order declares to be deceptive or misleading", cannot be construed as creating a private right of action (35-36).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals for the Third Circuit has decided an important question of state law in a way which conflicts with the applicable state and federal decisions on the subject. While the question as to whether unfair competition exists in the use of similar names by two mutual funds may appear to be a narrow one, it is an important one because this practice has been widespread in this nationwide industry which involves 330 different funds with investors' assets in excess of $20 billion. The decision of the Court of Appeals will therefore affect many other companies in the mutual fund industry.

2. The assumptions as to the nature of the mutual fund industry and the relationships embodied in it which led to the result reached by the Third Circuit are directly contrary to those adopted by the Ninth Circuit in *S. E. C. v. Insurance Securities, Inc.*, 254 F. 2d 642 (9th Cir.), cert. denied, 358 U. S. 823, 3 L. Ed. 2d 64 (1958). While the cases are not factually similar, they require the same appraisal of the nature of a mutual fund and the relationships among the fund, its adviser, the underwriter and the investors. The Third and Ninth Circuits have reached diametrically opposite conclusions and the decisions must inevitably lead to conflicting results in other cases involving mutual funds.

Fund	Date Fund Name Adopted	Sponsor	Adviser	Net Assets as of 12-31-60 (000 omitted)
Axe-Houghton Fund A, Inc.	1934	Axe Securities Corp.	E. W. Axe & Co.	$ 46,487
Axe-Houghton Fund B, Inc.	1938	"	"	151,180
Axe-Houghton Stock Fund, Inc.	1953	"	"	7,289
Axe-Science & Electronics Fund	1955	"	"	19,428
Commonwealth Income Fund	1957	North American Sec. Co.	(Sponsor)	189,984
Commonwealth Investment Company	1932	"	"	
Commonwealth Stock Fund	1952	"	"	
Composite Bond & Stock Fund, Inc.	1939	Murphy Favre, Inc.	Composite Research & Management Co.	7,831
Composite Fund, Inc.	1949	"	"	12,561
Delaware Fund, Inc.	1937	Delaware Distrib., Inc.	Delaware Co.	100,944
Delaware Income Fund	1956	"	"	8,467
DeVegh Investing Company, Inc.	1953	None	DeVegh & Co.	8,573
DeVegh Mutual Fund, Inc.	1950	"	"	20,045
Diversified Growth Stock Fund, Inc.	1952	H. W. Long Co.	Investors Management Co.	106,327
Diversified Investment Fund, Inc.	1944	"	"	96,608
Eaton & Howard Balanced Fund	1932	Eaton & Howard, Inc.	(Sponsor)	200,807
Eaton & Howard Stock Fund	1931	"	"	167,666
Fidelity Capital Fund, Inc.	1957	The Crosby Corp. (and) Hornblower & Weeks	Fidelity Management & Research Co.	31,969
Fidelity Fund, Inc.	1930	The Crosby Corp.	"	397,579
Group Securities, Inc. (offering 20 separate funds)	1933	Distributors Group, Inc.	(Sponsor)	168,978
Imperial Capital Fund, Inc.	1960	Imperial Financial Services, Inc.	(Not in Record)	14,139
Imperial Fund, Inc.	1958	"	"	3,485
Incorporated Income Fund	1954	The Parker Corp.	(Sponsor)	107,898
Incorporated Investors	1925	"	"	299,523
Institutional Shares, Ltd.—offering:				
Institutional Bank Fund	1946	Hare's Ltd.	Van Strum & Towne, Inc.	157,762
Institutional Foundation Fund	1946	"	"	
Institutional Growth Fund	1946	"	"	
Institutional Insurance Fund	1946	"	"	
Institutional Income Fund, Inc.	1953	"	"	35,338
Investors Group Canadian Fund, Ltd.	1954	Investors Diversified Services, Inc.	(Sponsor)	111,925
Investors Mutual, Inc.	1940	"	"	1,599,213
Investors Selective Fund, Inc.	1945	"	"	28,496
Investors Stock Fund, Inc.	1945	"	"	713,130
Investors Variable Payment Fund, Inc.	1957	"	"	166,113

Investors Stock Fund, Inc.	1945	"	"	713,130
Investors Variable Payment Fund, Inc.	1957	"	"	166,113
Keystone Custodian Funds, Inc., Trustee for:			Keystone Custodian	
B-1, B-2, B-3, B-4	1935	The Keystone Co.	Funds, Inc.	546,691
K-1, K-2	1935	"	"	
S-1, S-2, S-3, S-4	1935	"	"	
Knickerbocker Fund	1938	Knickerbocker Shares	Karl D. Petit & Co.	12,110
Knickerbocker Growth Fund	1953	"	"	1,028
Massachusetts Investors Growth Stock Fund, Inc.	1940	Vance, Sanders & Co.	Directors and Advisory Board	378,001
Massachusetts Investors Trust	1924	"	Trustees	1,508,350
National Balanced Series	1947	Nat'l Sec. & Research Corp.	(Sponsor)	470,820
National Dividend Series	1940	"	"	
National Bond Series	1940	"	"	
National Growth Stocks Series	1940	"	"	
National Income Series	1940	"	"	
National Preferred Stock Series	1940	"	"	
National Stock Series	1940	"	"	
George Putnam Fund of Boston	1937	Putnam Fund Dist., Inc.	The Putnam Management Co.	222,900
Putnam Growth Fund	1957	"	"	60,768
Scudder Fund of Canada, Ltd.	1953	Scudder Fund Distr.	Scudder, Stevens & Clark, Ltd.	52,028
Scudder Special Fund	1956	"	Scudder, Stevens & Clark	25,940
Scudder, Stevens & Clark Common Stock Fund, Inc.	1950	"	"	37,098
Scudder, Stevens & Clark Fund, Inc.	1928	"	"	77,906
Stein Roe & Farnham Balanced Fund, Inc.	1959	None	Stein Roe & Farnham	50,707
Stein Roe & Farnham Stock Fund	1958	"	"	15,860
United Accumulative Fund	1940	Waddell & Reed, Inc.	Continental Research Corp.	411,052
United Continental Fund	1952	"	"	44,158
United Income Fund	1940	"	"	262,443
United Science Fund	1940	"	"	145,866
Value Line Fund, Inc.	1950	Value Line Fund Dist., Inc.	Arnold Bernhard & Co., Inc.	8,379
Value Line Income Fund, Inc.	1952	"	"	79,835
Value Line Special Situations Fund, Inc.	1956	"	"	11,866
Wellington Equity Fund	1958	The Wellington Co.	Wellington Co., Ltd.	50,970
Wellington Fund, Inc.	1928	"	Wellington Management Co.	1,133,540

ARGUMENT.

I. The Decision Herein Condemns a Proper and Widespread Practice in the Industry Which Has Been in Effect for Many Years.

Unfair competition in the use of trade names originally encompassed the palming off of the goods of one as those of another; *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 413, 60 L. Ed. 713, 718 (1916). It was then expanded to cover situations in which the public may conclude that goods or services come from the same source or origin; *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407 (2nd Cir. 1917); *S. C. Johnson & Son, Inc. v. Johnson*, 175 F. 2d 176 (2nd Cir. 1949). The touchstone of the wrong is confusion of the public either as to the goods or services themselves or as to their source or origin, and the damage, actual or threatened, which such confusion may bring to the business interests of the first user.

In this case, the investment adviser used the Wellington name first in 1931. It permitted the mutual fund which it advised at that time to take that name in 1935. In 1958 the adviser-sponsor organized a second fund with different investment objectives and gave it a name similar to its own and that of the first fund. In doing so, it followed an industry practice of long standing.

The table attached to this page lists the clusters of similarly named funds under common investment management and or sponsorship at the end of 1958. The 91 funds there listed represent a substantial portion of the approximately 330 mutual funds in existence today. Many of the remaining funds are single funds, i.e., the adviser-sponsor has no other fund to offer. The earliest similar naming of funds occurred in 1932 with the formation of Eaton & Howard Balanced Fund and by the 1940s the practice had become quite prevalent. The three largest mutual funds are included in the table. The largest fund

is Investors Mutual, Inc. and two of its sister funds were organized in 1945. The second largest fund is Massachusetts Investors Trust and its sister fund adopted a similar name in 1940. The third largest fund is Wellington Fund. There is nothing in the facts of this case or in the result announced by the Court of Appeals which distinguishes this case from any of the other situations reflected in the table. Inevitably, the decision here condemns this widespread industry practice, unjustifiably we believe.

The prevalence of this practice over a long period of time deals two fatal blows to the foundation of the decision here. In the first place, if the similar naming of funds under common investment management and sponsorship resulted in any type of confusion of investors, the Securities and Exchange Commission, which has an express duty with respect to deceptive or misleading names under Section 35(d) of the Investment Company Act of 1940, The State Blue Sky commissioners, many of whose securities statutes prohibit false and misleading practices and even the courts at the behest of investors would have stepped in long ago to prevent such confusion. Witnesses in this case represented all segments of this industry and included one of the state commissioners. They testified without contradiction that they knew of no instances of confusion of investors resulting from this similar naming of mutual funds.

In the second place, the practice confirms what the Petitioners have contended as to the significance to investors of similarly named mutual funds. Similar names have been used when the funds are under the same investment management and/or sponsorship. The common name signifies this common source of advisory and/or sales services. Since Wellington Fund and Wellington Equity Fund receive investment advisory and sales services from the same organization, the implication to investors resulting from the common use of the Wellington name is entirely truthful.

Because of the impact of this decision on this industry practice, the case should be reviewed by this Court.

II. The Errors in the Reasoning of the Court of Appeals.

The reasoning of the Court of Appeals appears to be this: that the resolution of the issues here requires a determination as to whether the mutual fund or the investment adviser was held in high esteem by the public; that the District Court found, and there was evidence to support it, that Petitioners had used the Wellington name in connection with advisory and sales services whereas the public's contact had been exclusively with Wellington Fund; and that the fact that the advisory and sales services added value to the name did not aid Petitioners because they had been paid to create a favorable image of Wellington Fund.

The questions of *who* is held in high esteem by the public and *who* has a favorable public image do not correctly state unfair competition issues. The function of trade-marks and trade-names is to identify goods, services or business activities in the market place. Public knowledge is important in determining *what* goods, services or business activities are associated with a trade-name; but the public need not be aware of the *identity* of the source of those goods, services or business activity; 3 *Restatement, Torts* § 715, *comment* b, § 716, *comment* a; *Walter Baker & Co. v. Slack*, 130 Fed. 514 (7th Cir. 1904); *The Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, Inc.*, 19 Del. Ch. 151, 162, 164 Atl. 246, 250 (1933). The question of *who* is entitled to goodwill and its related symbols is determined by who controls the quality of those goods, services or business activities, regardless of whether he is known to the public.

Manufacturers of cigarettes emphasize their various brand names and keep their own identities very much in the background. "Howard Johnson" has become a widely known "public image" for a certain quality of restaurant and lodging service, yet the public is unaware of the identity of the entity that controls the use of that name. Arthur Murray, the famous dancer, has maintained the right to

exploit the use of his name despite its use by many other concerns over which he has no internal control; he does so by maintaining control over the quality of the dancing instruction offered to the public by those concerns, and the public is unaware of how that control is exercised or by what entity it is controlled; see *Arthur Murray, Inc. v. Horst*, 110 F. Supp. 678 (D. Mass. 1953).

The Courts below recognized that the adviser-sponsor has used the Wellington name in connection with advisory and sales services. In giving Wellington Fund the right to control the use of the name by other funds they are noticeably silent on the subject of what goods or services are offered or what business activity is conducted by Wellington Fund with respect to which the name has value to it. The mutual fund being what it is, i.e., a vehicle by which investors pool their resources to obtain diversification and professional investment supervision, there are no such goods, services or business activity of the fund in this market place; the *only* services offered are those of the adviser-sponsor. These are what the investor buys when he purchases fund shares.

In the portion of the District Court opinion quoted by the Court of Appeals, a distinction is made between the fields in which the adviser-sponsor operates and the field of the mutual fund. "In the law of unfair competition the fields of protection are measured by actual and foreseeable use; *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407 (2d Cir. 1917); *S. C. Johnson & Son, Inc. v. Johnson*, 175 F. 2d 176 (2d Cir. 1949). Mutual funds, their advisers and sponsors are inextricably bound together in one field of business activity. The relationships are not significantly different from those which exist among the manufacturer, wholesaler and distributor of a product or service, who are considered to be in the same field of activity for purposes of unfair competition; 3 *Restatement, Torts* § 734; *Fishel & Sons, Inc. v. Distinctive Jewelry Co.*, 196 App. Div. 779, 188 N. Y. Supp. 663 (App. Div. 1921). The attempt to

place the fund in a different field of activity from the adviser-sponsor is unsupportable. This separation of fields of activity was the only way the courts below could avoid the obvious consequences of the fact that the adviser has used the name longest in this field.

As to the Court of Appeals' observations that effective performance of the advisory and underwriting services necessarily created a favorable public image of the Fund, that the adviser-sponsor had been paid for these services and that the reputation belonged to Wellington Fund, this misconceives defendants' position which is that the Wellington name signifies advisory and sales services to investors, those being the only services available in the mutual fund market place. Lawyers and doctors serve their clients and patients for fees. The acceptance of the fees does not render to the client or patient the reputation created by the successful performance of those services.

It is necessarily inherent in the position of the Respondents and in the reasoning of the Courts below that Wellington Fund has an important interest in the market place in which its shares are sold; otherwise what could be its concern with a trade-name used in that market place. Yet other members of Respondents' family group represented by the same attorneys who represented Respondents have just recently instituted another suit in the Eastern District of Pennsylvania charging that the adviser and sponsor have wronged Wellington Fund and its shareholders by building it to an unwieldy size. The basic premises of these two positions are completely contradictory. The facility with which Respondents are able to change positions in this fashion demonstrates how insubstantial is the premise that a mutual fund name has any substantial value to it in the sale of its own shares.

The decision below results in certain anomalies which demonstrate its error:

1. Wellington Fund is given the right to control the use of the name in the mutual fund market place, and yet

the transactions in that market place do not provide it with any direct financial benefits. The prices at which mutual fund shares are sold and redeemed are computed on the basis of the market value of the portfolio. The fund makes no profit on the sale or redemption of its shares, and in each case the assets are increased or decreased in exact proportion to the ownership which is added or subtracted. Only the sponsor and adviser profit by the transactions in this market place; the sponsor by his share of the sales commission and the adviser by the addition of a client for his services.

2. The right to use the name in this market place is given to an entity which can make no other use of it and realize no monetary benefit from it; the only one who can make such use of it is denied the right. Wellington Fund is a balanced fund and its sponsor has attracted over 300,000 investors to the Fund's investment objectives. If Wellington Fund were to change its objectives or engage in some other business enterprise, it would cease to be a balanced fund and would thereby deny these investors their rightful expectations. As the Fund's shares are priced on the basis of the portfolio value, the shareholders do not and cannot receive one additional penny by reason of the Fund's interest in the name. On the other hand, the only way in which the adviser-sponsor can engage in a new venture is by organizing another mutual fund with different investment objectives. It should be able to bring to bear on its new enterprise the reputation it has established by means of its earlier fund. The use of similar names permits this.

3. It has been axiomatic that trade-marks and trade-names and the goodwill to which they relate do not exist in gross, but are inseparable from the goods, services or business with which they are used. Wellington Fund engages in no business activity in this market place; it has nothing which it could transfer to another which will carry the name

and goodwill with it. The sponsor is busy in this market place selling shares and thereby attracting new investors to the services of the adviser. The adviser and sponsor have substantial organizations engaged in this business, the transfer of which would support a transfer of the name and goodwill.

4. The producer of services has been penalized in this case by electing to publicize the vehicle by which his services are made available rather than himself. There are many examples in today's market places in which producers have chosen to emphasize their goods or services rather than their own identities. In other cases, the producers emphasize their own identities. Heretofore, this has not changed the right of the producer in either situation to exploit the results of those efforts. The advisers and sponsors of mutual funds have a similar choice. They may emphasize their own identities or they may emphasize the fund through which their services are made available. The choice of this adviser-sponsor to publicize its fund has proven fatal. In 1958, a fund with the inconspicuous name "One William Street" enjoyed a tremendous initial success because of the fine reputation of Lehman Brothers, its adviser. At the same time, the well-known investment counselling firm of Lazard Freres elected to identify its new fund with its own name, "Lazard Fund". These two very successful mutual fund launchings demonstrate that it is the reputation of the adviser and sponsor which makes for success or failure in the sale of mutual fund shares.

5. The reasoning in this case applies equally well to mutual funds in the form of business trusts. However, the law has not breathed fictional life into the trust entity so that the claim of unfair competition would have to be asserted by the beneficiaries or the trustee. If the trustee performed the investment advisory services as in the case of a bank with a common trust fund, could the beneficiaries complain if it started a second fund with a similar name?

If the trustee performed merely ministerial duties and engaged an investment adviser to manage the portfolio, could the trustee or the beneficiaries claim unfair competition if the adviser managed another fund with a name similar to that of the adviser? There would be no merit in either of these claims. Yet the only difference between these situations and the present case is the fact that Wellington Fund is a corporation. That fact adds nothing to the question of whether unfair competition exists.

6. There are some situations in which several mutual funds are housed within the same corporation. Each mutual fund is a separate series of stock and has its own portfolio of securities. There is no connection between the shares or portfolios of the several funds. Everything which the Courts here have said about unfair competition between Wellington Fund and Wellington Equity Fund will be equally true with respect to the funds under the same corporate mantle. Yet unfair competition in that context is inconceivable.

The result in this case has been dictated by the fact that Wellington Fund is a corporation; yet neither the corporate form nor principles of corporate law have any bearing on unfair competition which deals with the conduct of business enterprises in the marts of trade. Mutual fund adviser-sponsors have ingeniously adapted the corporate form to an entirely new and novel use which transgresses no existing legal principles. However, the law as reflected in the decision here has failed to keep pace. In *Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp.*, 109 F. 2d 35 (D. C. Cir. 1939), cert. denied, 309 U. S. 684, 84 L. Ed. 1028 (1940), the court warned, at page 43, against assuming for every corporation what is "generally", "normally", "usually" and "ordinarily" true of most corporations. That error has occurred here.

While there are many differences between a corporate mutual fund and a business corporation, there is one which highlights the danger of carrying traditional expectations

over to this new enterprise; that is the continuous sale and redemption of the Fund's shares at prices based upon portfolio values. When the investor buys, he receives shares newly issued by the fund; when he sells, his shares are redeemed by the fund. As a consequence, there is no permanence to the "capital" of the corporate mutual fund and its shares do not pass from shareholder to shareholder as in the case of the usual business corporation. These and other differences require a searching analysis of the realities in this market place divorced from preconceived notions as to how corporations generally behave. That analysis and the necessary understanding which should flow from it are lacking here.

In answer to Petitioners' contention that the similar naming of funds indicates a common source of advisory and sales services, the Third Circuit said it should not be assumed that the advisory contract will be continued indefinitely (28-29). Wellington Equity Fund's charter provides that, if The Wellington Company or a successor ceases to be its adviser and sponsor, Equity Fund will on request discontinue using the Wellington name (683a). Thus, a termination of the essential relationship will result in the discontinuance of the use of the name by Equity Fund.

III. The Conflict With the Decision by the Ninth Circuit.

The decision in *S. E. C. v. Insurance Securities, Inc.*, 254 F. 2nd 642 (9th Cir.), cert. denied, 358 U. S. 823, 3 L. Ed. 2d 64 (1958), was not concerned with unfair competition but it stands four-square against the conclusion reached here. That case involved a mutual fund in trust form. Individual defendants had sold a controlling block of the stock of the adviser-sponsor at a price greatly in excess of the book value. The S. E. C. brought an action under § 36 of the Investment Company Act of 1940, 15 U. S. C. § 80 a-35, claiming that the sale of the majority of the stock of the sponsor at a price in excess of the book value of the

shares (i) was based upon the expectation that the advisory and distribution contracts would be renewed, (ii) constituted an appropriation of an asset of the fund, and (iii) was, therefore, gross misconduct or gross abuse of trust. The Court of Appeals affirmed the dismissal of the Complaint. It said that a large part of the value of the adviser-sponsor could be attributed to the contract with the fund but this value was not an asset of the fund; that the value of the contract to the fund lay in the investment, administrative and other services received thereunder, which was all that it paid for; that the value of the contract to the adviser-sponsor lay in the profit it received as a result of rendering the services; and that the value of the adviser-sponsor stock was based largely upon the expectation that the contracts would be renewed and the profits continued, which prospect was no more an asset of the fund than the current profits of the adviser-sponsor.

The prospect of continued profits in that case resulted from the expectation that the investors would continue to use the services of the adviser-sponsor. That prospect was a monetary measurement of the goodwill which the adviser-sponsor had created for its services. That goodwill exists in the investors who have been attracted to the services of the adviser-sponsor in the mutual fund market place where fund shares are sold and the name is a symbol of whatever goodwill there is in that market place. While the *Insurance Securities* case dealt with the monetary value of investor goodwill, this case deals with a trade symbol of that same goodwill. The Ninth Circuit assigns the monetary value to the adviser-sponsor, correctly we believe. The Third Circuit assigns the trade symbol to the fund. The results are irreconcilable.

IV. Conclusion.

Mutual funds are a relatively new member of the business community. They have come of age only in the last ten years or so. Prior to that time, investment advisers

and sponsors worked hard and diligently for very modest compensation in an effort to obtain dealer and investor acceptance of the mutual fund method of investing and to attract investors to their services. The current period of success is merely a reaping by the advisers and sponsors where they have sown. It has been suggested that the disappearance of large pools of private capital is making more difficult the task of providing equity financing for American Business. The mutual funds, by pooling the resources of many small investors, are in a position to fill this void. They have performed a very significant task for investors and are in a position to perform an even greater function in making equity capital available to American business.

Because of their relatively recent appearance, mutual funds and their adviser-sponsors have become involved in litigation only in the last several years. Few courts have been required to examine fully and carefully into the workings of the industry and to determine how accepted legal principles should be applied in light of the unusual factual situation which prevails in this industry. In view of the industry practice with respect to the use of similar names for related funds which is here condemned by the Court of Appeals and in view of the conflict between the Ninth and Third Circuits in their appraisal of the industry, it is submitted that it is appropriate for this Court to review the decision below and to insure a correct start in the adaptation of legal principles to this new and important member of the business community.

Respectfully submitted,

DANIEL MUNGALL, JR.,
Counsel for Petitioners.

Of Counsel:

STRADLEY, RONON, STEVENS & YOUNG,
1222 Western Saving Fund Bldg.,
Phila. 7, Pa.

APPENDIX TO PETITION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,702
13,703
13,704
13,705

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, His Wife, as Tenants by the Entireties

v.

WELLINGTON FUND, INC.,
WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY, AND
WELLINGTON COMPANY, LTD.,
Delaware Corporations

WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY,
WELLINGTON COMPANY, LTD.,
Appellants in 13,702

WELLINGTON FUND, INC.,
Appellant in 13,703

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, His Wife, as Tenants by the Entireties,
Appellants in 13,704 and 13,705.

Appeal From the United States District Court for the District of Delaware

Submitted July 23, 1962

Before: Kalodner, Hastie and Smith, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 23, 1963)

By HASTIE, *Circuit Judge*.

In this stockholders' derivative suit the district court decided that the adoption and use of the name "Wellington" by Wellington Equity Fund, an open-end, diversified, management investment company, constituted unfair competition in relation to Wellington Fund, Inc., a similar enterprise which had become well and favorably known as a large, active and successful mutual fund long before the 1958 organization of Wellington Equity Fund as a new investment company.

The plaintiffs are stockholders of Wellington Fund, Inc., and sue in the interest of that corporation and its stockholders, although the corporation itself is formally designated as a defendant. The other defendants, against whom relief is sought, are the above mentioned Wellington Equity Fund and two related enterprises. Defendant Wellington Co., Ltd., is the investment adviser of Wellington Equity Fund. Defendant Wellington Co. is sued as distributor of both Wellington Fund and Wellington Equity Fund, and as investment adviser of Wellington Fund.[1] All of the defendants are Delaware corporations.

The complaint charged that the adoption and use of the name "Wellington" by Wellington Equity Fund constituted both an actionable violation of federal rights derived from the Investment Company Act of 1940, 54 STAT. 789, 15 U. S. C. § 80a, and a violation of the common law[2] of unfair

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1. A subsequent transfer of these functions from Wellington Co. to other corporations is of no present consequence.

2. The court below discussed but did not decide whether Delaware law or so-called federal common law determined the legality of the challenged adoption of the name "Wellington". Nothing turns on that choice of law here. No relevant peculiarity of Delaware law appears in the cases. Rather, the Delaware courts in their search for

competition. The same relief, an injunction and monetary recovery, was sought under both the statutory claim and the common-law claim.

Diversity of citizenship not having been established, the district court found in the complaint an assertion of federal question jurisdiction, adequate under the doctrine of pendent jurisdiction to permit the consideration of the common law claim as well. Relief was then granted solely upon the common-law claim. 187 F. Supp. 179, 220. More particularly, Wellington Equity Fund was enjoined from using the name "Wellington", and the advisory and distributing corporations were enjoined from using that name with reference to any investment company other than Wellington Fund. The prayer of the plaintiffs for damages and an accounting was denied. Wellington Equity Fund and the two associated corporations have appealed from the granting of injunctive relief. The plaintiffs have appealed from the denial of damages and an accounting.

Jurisdiction is our first concern. The alleged violation of the common law of unfair competition, standing alone, would not have been within federal jurisdiction. But here, the coupling of this basis of recovery with a contention that the conduct of the defendants also violated federal statutes is said to bring the alleged violation of state

controlling general principles of unfair competition have relied largely upon the body of law developed in federal decisions. *See, e.g., American Radio Stores, Inc. v. American Radio & Television Stores Corp.*, 1950, 17 Del. Ch. 127, 130-131, 150 Atl. 180, 182; *Cf. Hygienic Specialties Co. v. H. G. Salzman, Inc.*, 2d Cir. 1962, 302 F. 2d 614, 619 n. 9. Nevertheless, we observe in passing that a strong case can be made for applying state law in situations of this kind, see *National Fruit Product Co. v. Dwinell-Wright Co.*, D. Mass. 1942, 47 F. Supp. 499, 502-504, *aff'd.* 1st Cir. 1944, 140 F. 2d 618, as is done in diversity cases alleging unfair competition, *Pechcur Lozenge Co. v. National Candy Co.*, 1942, 315 U. S. 666. Moreover, the particular issues contested here—the legality of the adoption of part of the name of one Delaware corporation by another and the legal characterization of the conduct of the directors of the first corporation in consenting to the appropriation—may well be viewed as matters of special concern to the state of incorporation and peculiarly within its regulatory competence.

law within the so-called pendent jurisdiction of a federal court.

Decision on this jurisdictional point is simplified in this case by the fact that the relief sought is the same on both legal grounds. Moreover, this case does not involve the often vexatious question whether the factual basis for federal statutory relief is substantially different from the factual basis of the asserted common-law right or, as the issue is often stated, whether the suit presents a single cause of action. Here, it is clear that essentially the same facts are relevant whatever the liability-creating law may be. The one issue requiring discussion is whether the asserted federal statutory claim is substantial enough to justify the adjudication of the coupled common-law claim. In other words, the debatable matter is whether federal question jurisdiction is established as a basis for ancillary jurisdiction.

The leading cases on pendent jurisdiction hold that an actual right to relief under some federal statute need not be established to justify adjudication of the merits of a coupled common-law claim. *Hum v. Oursler*, 1933, 289 U. S. 238; *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 1938, 305 U. S. 315. The common-law claim must be dismissed only if the coupled federal contention is "plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy' ". *Levering & Garrigues Co. v. Morrin*, 1933, 289 U. S. 103, 105-106. See also *Bell v. Hood*, 1946, 327 U. S. 678, 681-683.

Thus, we must consider whether such "unsubstantiality" characterizes the claim that the use of the name "Wellington" by Wellington Equity Fund violates a federal right derived from the Investment Company Act of 1940. In the court below the starting point for this inquiry

was Section 35(d) of the statute, 54 STAT. 840, 15 U. S. C. § 80a-34(d), which provides:

> "It shall be unlawful for any registered investment company hereafter to adopt as a part of the name or title of such company . . . any word or words which the Commission finds and by order declares to be deceptive or misleading. The Commission is authorized to bring an action in the proper district court of the United States or United States court of any Territory or other place subject to the jurisdiction of the United States alleging that the name or title of any registered investment company, or of any security which it has issued, is materially deceptive or misleading."

Under this section a district court would have jurisdiction to adjudicate a claim by the Securities and Exchange Commission that the use by one open-end, diversified, management investment company of an identifying part of the name of another should be enjoined in order to avoid harm resulting from the confusion of investors as to the identity of either fund or the investment opportunity it offers to the general public. But this is just the beginning of the reasoning required to establish federal question jurisdiction over the present private civil suit. The plaintiffs must argue that once the federal statute has made it legally wrong for an investment company to adopt a name that is materially deceptive or misleading, it is within the authority of a federal court to provide a civil remedy to anyone aggrieved by that wrong, even though the special remedy Congress has provided for the wrong is of a different character. It is arguable on the one hand that in this situation it should be implied that the remedy provided by Congress is exclusive, as has been done with reference to the National Labor Relations Act. *Cf. Amalgamated Util. Workers v. Consolidated Edison Co.*, 1940, 309 U. S. 261. On the other hand, it is arguable, as has been held in certain cases under the Secu-

rities Exchange Act of 1934, that a court may properly afford civil relief to a person injured by deceptive conduct which Congress has declared unlawful, even in the absence of an express provision for such a remedy. *Cf. Baird v. Franklin*, 2d Cir., 1944, 141 F. 2d 238, 244-245, *cert. denied* 323 U. S. 737; Note, 1948, 61 HARV. L. REV. 858.

More generally, it is frequently held that a breach of statutory duty which causes injury to one of the class that the statute serves to protect affords by implication a sufficient basis for a private civil suit by the injured party. *Texas & Pac. Ry. v. Rigsby*, 1916, 241 U. S. 33; *Tunstall v. Brotherhood of Locomotive Firemen*, 1944, 323 U. S. 210. 2 RESTATEMENT, TORTS § 286. To apply that doctrine here would require a conclusion that section 35(d) is legislation for the protection, not only of those contemplating investment, but also of investors and investment companies already in the field. Nothing has been pointed out in the legislative history of the Investment Company Act of 1940 which bears upon this point, and it may reasonably be doubted whether Congress adverted to it. However, congressional contemplation of implied private rights of action may be suggested by a provision of section 44 of the Act, 54 STAT. 844, 15 U. S. C. § 80a-43, giving the district courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of" the Act. No provision of the Act expressly grants private rights of action, yet the quoted language seems to provide a forum for such suits.

The sums of all of this is that it is legally debatable whether the right which plaintiffs assert can properly be derived from the Investment Company Act of 1940. For conflicting views of a similar question under another section of the Act, contrast *Brown v. Bullock*, 2d Cir., 1961, 294 F. 2d 415, with *Brouk v. Managed Funds, Inc.*, 8th Cir. 1961, 286 F. 2d 901, *vacated as moot*, 1962, 369 U. S. 424. Certainly such a contention is not frivolous. It is not foreclosed by any decision of the Supreme Court. And finally, it would

be particularly difficult for this court to deny the substantiality of the contention since we have recognized the existence of an implied private right to relief in somewhat analogous circumstances under the Securities Exchange Act of 1934. See *Slavin v. Germantown Fire Ins. Co.*, 1949, 174 F. 2d 799; *Speed v. Transamerica Corp.*, 1956, 235 F. 2d 369, *aff'g* D. Del. 1951, 99 F. Supp. 808, s.c., D. Del. 1947, 71 F. Supp. 457. We hold, therefore, that the district court had federal question jurisdiction over the cause of action asserted under section 35(d) of the Investment Company Act of 1940 and pendent jurisdiction to determine whether the conduct in suit constituted common-law unfair competition.

We come now to the merits of the unfair-competition claim. In substance, the court below found (1) that in the investment company field valuable good will attached to and was symbolized by the name "Wellington", (2) that this good will was property of Wellington Fund which could not lawfully be appropriated by a new investment company calling itself Wellington Equity Fund and (3) that the consent of the directors of Wellington Fund to this appropriation was invalid.

For many years before 1958, Wellington Fund had provided the investor who bought its shares a proportional interest in a "balanced" multi-million dollar portfolio of securities. The Fund is committed to conservative investment policies with the stated and well publicized objectives of "conservation of principal, reasonable income return, and profits without undue risk". Through the purchase of Wellington Fund shares the small investor obtains the benefit of a diversification of holdings and a continuity of skilled management services that would otherwise be beyond his reach. Since this is an "open-end" fund, it continually offers to sell additional shares in the enterprise and to redeem outstanding shares. The attractive features of the fund and its successful as an instrumentality for profitable yet conservative investment have been widely advertised,

with Wellington Fund billed as "A Name To Remember When Investing". In brief, by 1958 Wellington Fund had become one of the largest and most highly regarded mutual funds, with nearly 250,000 shareholders and assets worth $750,000,000.

All of this was frankly recognized by the organizers of the new Equity Fund in their choice of a corporate name featuring "Wellington". Indeed, these organizers were members of the management group which was already engaged in promoting Wellington Fund and guiding its investments. They acted pursuant to their conviction that it would be good business to enable dealers marketing the balanced Wellington Fund also to have a common stock fund under their management available for less conservative investment by persons whose primary objective was growth of capital and increasing gain. They believed that the name "Wellington" would be valuable to the new enterprise, enabling it to benefit from the success and good reputation of Wellington Fund.

In these circumstances, the defendants do not deny the value of the Wellington name; rather, they argue that the right to exploit its good will in the investment company field belongs to the management company which itself bears the name Wellington and made that name popular and valuable through the skillful promotion and management it provided for Wellington Fund. This argument makes it necessary to determine whether it was the mutual fund itself or the associated management company which the investing public held in high esteem. This is a question of fact. The court below considered and disposed of this question, saying:

> "Until entry into the field by Wellington Equity Fund in 1958, Wellington Fund has had the exclusive continuous use of the 'Wellington' name in the investment company arena since 1935. Defendants' use of the name has been primarily in conjunction with investment advisory and underwriting services. The public's

contact with the name 'Wellington' has almost exclusively been with Wellington Fund. In fact, this Court was surprised when two of defendants' expert witnesses, particularly knowledgeable in the investment company field, could not name Wellington Fund's investment adviser. No greater knowledge can be imputed to the investing public. Further evidence 'Wellington Fund' is the trade name that has achieved public acceptance and that the noninvestment companies bearing the 'Wellington' name are little known to the investing public is borne out by the many corporate changes in name and in function that the noninvestment companies have undergone." 187 F. Supp. at 214.

Our own examination of the record satisfies us that the trial court's conclusion is adequately supported by evidence.

The additional contention that the advisory and promotional services of the management company added value to the name "Wellington" does not strengthen the defendants' position. These services were contractual undertakings performed for Wellington Fund. Their effective performance would necessarily create a favorable public image of the Fund and any investment opportunity it should sponsor. That reputation is no less the property of Wellington Fund because services or commodities obtained from others may have contributed to it. *Cf. Radio Shack Corp. v. Radio Shack, Inc.*, 7th Cir. 1950, 180 F. 2d 200. In return for conferring this benefit upon the Fund, Wellington Company received an agreed consideration in the form of management fees and sales commissions which, in the single year preceding the organization of the Equity Fund, aggregated more than two million dollars. It is entitled to nothing more, certainly not to treat as its own property the good will it created for its client.

Apart from these considerations peculiar to the organization and interrelation of the defendant corporations, the

normal essentials of unfair competition are present in this case. "Wellington" had been established as the identifying name of a mutual fund. Danger of confusion is inherent in the adoption of that name by a new mutual fund. Although that danger is lessened to a degree by the fact that the new enterprise is a common stock fund while the older one is a balanced fund, the record shows that common stocks normally constitute more than half the value of Wellington Fund's portfolio. In such circumstances, there is substantial basis for apprehension that the ordinary investor will confuse the two enterprises, at least to the extent of attributing to Wellington Fund some sponsorship of the new fund bearing the Wellington name. The result is that Wellington can no longer be sure "that its reputation shall be of its own making alone". *Time, Inc. v. Ultem Publications, Inc.*, 2d Cir. 1938, 96 F. 2d 164, 165. Such appropriation of another's name and reputation "is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful". *Yale Electric Corp. v. Robertson*, 2d Cir. 1928, 26 F. 2d 972, 974. We think it is clear from what has already been said that in this case "the borrower's use is [not] so foreign to the owner's as to insure against any identification of the two".

We have not overlooked a contention of the defendants that there is no impropriety in the identification of the two enterprises in the public mind because both are now served by the same investment adviser. But, even so, situations may arise in which eventuation of the greater risks involved in the common stock fund will cause the investment experience of that fund to reflect unfavorably upon its supposed sponsor. Moreover, it is not required and should not be assumed in the adjudication of this controversy that the two funds will continue to employ the same investment

adviser indefinitely. Indeed, the Investment Company Act of 1940 limits the duration of advisory contracts, empowers investment companies to terminate them at will and without cause, and requires periodic shareholder ratification of such contracts. 54 STAT. 812, 15 U. S. C. § 80a-15. We are satisfied that, in appropriating the Wellington name, the new Equity Fund is trading on the reputation of the pre-existing Wellington Fund in a way that is not legally permissible without the consent of Wellington Fund.

The defendants' final point presents entirely different considerations. Evidence was introduced to show that the directors of Wellington Fund, seeking to serve the interests of that corporation, consistent with the interests of the Wellington Company and the new Equity Fund, consented to the use of the name Wellington by the new corporation. It is argued that this action constituted effective consent by Wellington Fund. If this position is sound, the plaintiff stockholders are also foreclosed, because they sue derivatively on behalf of Wellington Fund. *Schleiff v. Baltimore & O. R. R.*, Del. Ch. 1955, 130 A. 2d 321.

Formal approval of the use of the name Wellington by the new common stock fund occurred at the September 25, 1958 meeting of the Board of Directors of Wellington Fund, although the proposal had been discussed and had evoked favorable comment at an earlier meeting. The resolution of the board read as follows:

> "After full discussion of the matter and upon motion duly made, seconded and carried, it was
>
> "*Resolved*, That the Board continues to be of the opinion that the use of the name 'Wellington Equity Fund, Inc.' by that Corporation in connection with its common stock fund is in the best interests of Wellington Fund, Inc.,
>
> "*Further Resolved*, That the prior action of the Board and of the officers in approving the use of the name 'Wellington Equity Fund,

> Inc.' by that Corporation as a common stock fund is hereby formally reaffirmed, ratified, and approved;
>
> "*Further Resolved*, That the proper officers of this Corporation be, and they hereby are, authorized to execute and deliver, in the name of this Corporation, to Wellington Equity Fund, Inc., any instruments of license, consent or approval which may be necessary or advisable, in their sole discretion, to evidence the approval of this Corporation, whether or not such approval may be required, of the use by Wellington Equity Fund, Inc., of that name."

As Wellington Fund shareholders, the present plaintiffs promptly protested that this action was improper and invalid.

In resolving this issue, the district court reasoned that under Delaware law a gift of corporate assets, unless made to a charitable corporation, required unanimous stockholder approval. See *Frankel v. Donovan*, Ch. 1956, 35 Del. Ch. 433, 435 n. 2, 120 A. 2d 311, 312 n. 2. The court then found that the directors' resolution was "nothing more than the gift of a valuable corporate asset". 187 F. Supp. at 211.

The defendants have strongly argued to us that the questioned action was not a "gift" of the right to exploit corporate good will but rather a licensing of the use of the Wellington name which in the best business judgment of the directors would benefit all concerned, including Wellington Fund itself. They contend that it was improper for the district court to substitute its evaluation of the transaction for the honest judgment of the directors.

It is true that courts of equity have refused to substitute their judgment for the judgment of independent and disinterested directors who have honestly concluded that a proposed disposition of corporate assets will result in a justifying benefit to the corporate transferor. *Beard v.*

Elster, Del. 1960, 160 A. 2d 731. However, that rule does not apply when a majority of the directors are not disinterested in the proposed transaction. *Kennedy v. Emerald Coal & Coke Co.*, Sup. Ct. 1944, 28 Del. Ch. 405, 42 A. 2d 398, *cert. denied*, 1945, 324 U. S. 872; *Bale-Petroleum Corp. v. Hannigan*, 1949, 40 Del. (1 Terry) 534, 14 A. 2d 301; *Keenan v. Eshleman*, Sup. Ct. 1938, 23 Del. Ch. 234, 2 A. 2d 904. In this case, eleven of the thirteen members of the Wellington Fund board constituted the entire board of the new Wellington Equity Fund, which they authorized to use the Wellington name. When directors are thus interested in and obligated to both transferor and transferee, a court of equity is not obligated to accept the directors' judgment, but may and, indeed, should require them to prove to the court's satisfaction that the disposition of a valuable asset has been equitable. *Geddes v. Anaconda Copper Mining Co.*, 1921, 254 U. S. 590, 599, cited with approval in *Keenan v. Eshleman*, *supra* at 243-44, 2 A. 2d at 908; *Sterling v. Mayflower Hotel Corp.*, Sup. Ct. 1952, 33 Del. Ch. 293, 298, 314, 93 A. 2d 107, 110, 118-19; *Kennedy v. Emerald Coal & Coke Co.*, *supra* at 414-415, 42 A. 2d at 402; *Potter v. Sanitary Co. of America*, Ch. 1937, 22 Del. Ch. 110, 194 Atl. 87.

Turning to the merits of the directors' action, it is clear that the new corporation gave nothing to the Wellington Fund in exchange for permission to adopt the Wellington name as its own. But even though there was no consideration in a technical contractual sense, we have carefully examined the record for evidence of benefit to Wellington Fund as a result of the questioned transaction. Several witnesses did testify that some benefit to Wellington Fund was anticipated. In substance, their testimony was that a number of the independent securities dealers who handle the nationwide marketing of Wellington Fund shares had expressed a desire to be able to offer to their customers a common stock fund. Fear was expressed that, in a period when common stock funds were increasing in popularity, many dealers might lose interest in Wellington Fund unless

they were enabled to offer to their customers a common stock fund under the management and sponsorship which had made Wellington Fund an attractive choice for investors interested in balanced funds. In addition, the actual experience of dealers since 1958 shows that both funds have prospered.

We think this line of proof falls short of the mark. It may be that the interest of dealers in Wellington Fund shares was enhanced by enabling them also to handle a common stock fund enjoying the same advisory services. But this does not establish that naming the new fund "Wellington" would be or was helpful to the pre-existing Wellington Fund. To the contrary, we think the inference is permissible that this choice of a name, as distinguished from the availability of a new common stock fund by whatever name, served to popularize the new Equity Fund, to its advantage and to the advantage of the advisory and promotional corporations which would earn substantial fees and commissions if the new venture should prosper. Particularly revealing was the testimony of W. L. Morgan, who organized Wellington Fund[3] and was the president, a director and sole owner of the common stock of Wellington Company. He said:

> "It seems to me that if I spent money—Wellington Company spent money for twenty-five years advertising the name 'Wellington', you [sic] would not want to call it [the new Equity Fund] Locust Street or something."

In brief, the services of the Morgan promotional and investment management organization having contributed to the good will of the Wellington name, it seemed sensible to use that good will in making the new venture profitable to that organization. Such testimony indicates the difficulty

3. Wellington Fund has grown from an investment pool for personal clients of Mr. Morgan, an investment counsellor, to one of the nation's largest mutual funds. Mr. Morgan continues to serve as president of the corporation and as a director.

the Wellington Fund directors must have experienced in any effort to distinguish the interest of the shareholders of Wellington Fund from other interests which they also wished to promote.

In these circumstances, we cannot say that the district court was clearly wrong in finding as it did that "Wellington Fund was not the recipient of any discernible benefit", 187 F. Supp. at 212, from naming the new fund "Wellington". Consequently, the district court must be upheld in its rejection of this defense.

It remains to consider the plaintiffs' appeal from the refusal of the trial court to award them either damages or an accounting for profits. With reference to damages, the trial court found that it had not been proved that Wellington Fund had suffered monetary loss as a result of the existence or activity of Wellington Equity Fund. This conclusion is supported by evidence that sales of Wellington Fund shares and their value continued to increase in a substantial way after shares of Wellington Equity Fund were placed on the market. Conceding this continuing prosperity of Wellington Fund, plaintiffs have sought to avoid its impact by urging as a basis for their damage claim that, but for Wellington Equity Fund, it would have been possible for Wellington Fund to have enlarged its earnings by converting into a common stock fund. However, there is not the slightest indication in the record that such a conversion would have occurred had the new common stock fund not been in the field. There is no evidence that the shareholders of Wellington Fund were dissatisfied with its conservative type of investment or with its earnings. Certainly the directors of Wellington Fund could not have changed the basic character and objectives of the Fund without the consent of the shareholders, even if they had wished to do so. See Investment Company Act of 1940, § 13(a)(3), 54 STAT. 811, 15 U. S. C. § 80a-13(a)(3). In brief, it does not appear that the existence of the new common stock fund was even a *sine qua non* of Wellington Fund's

failure to earn larger profits. The denial of damages was clearly proper.

Turning to the matter of accounting, the plaintiffs do not argue that Wellington Equity Fund should account to Wellington Fund for enrichment attributable to the use of the Wellington name. The court below pointed out that any assignment of money value to such enrichment would necessarily be entirely speculative. Moreover, the beneficiaries of any such gain are the shareholders of Wellington Equity Fund who have done no wrong. What plaintiffs do ask is that they be granted an accounting for fe and commissions earned by the advisory and underwriting corporations, Wellington Company and Wellington Company, Ltd., in the management of Wellington Equity Fund investments and the sale of its shares. But any right to such an accounting must be predicated upon some breach of a fiduciary duty owed by these service corporations to Wellington Fund. With reference to Wellington Company, the court below rightly ruled that "plaintiffs' contention the investment advisory contract should be construed as providing for exclusivity of services simply has no foundation in the record". 187 F. Supp. at 216. A fortiori, Wellington Co., Ltd., which contracted to serve as underwriter for Wellington Equity Fund, but was a stranger to Wellington Fund, had no fiduciary obligation to Wellington Fund in connection with the commissions it earned on sales of Wellington Equity Fund shares.

Where unfair competition has been proved, relief is fashioned pursuant to the equities of the case at hand, often with the result that the wrongful conduct is enjoined without any attendant award of monetary compensation. *Champion Spark Plug Co. v. Sanders*, 1947, 331 U. S. 125; *National Van Lines v. Dean*, 9th Cir. 1956, 237 F. 2d 688. The nature and interrelation of various interests in this vigorously and ably contested case made the task of the trial judge, seeking an equitable resolution of the controversy, difficult. We think he achieved that objective by

restraining the use of the Wellington name and refusing to award damages or to order an accounting.

The judgment will be affirmed.

SMITH, *Circuit Judge*, dissenting.

This action is essentially one for unfair competition governed by common law principles. The majority holds that "the district court had federal question jurisdiction over the cause of action asserted under section 35(d) of the Investment Company Act of 1940, and pendent jurisdiction to determine whether the conduct in suit constituted common law unfair competition." This holding is based on the view that the cited section creates an implied right enforceable in a private civil action in the district court. I disagree.

We are in accord with the majority view that in the proper case "a breach of statutory duty which causes injury to one of the class that the statute serves to protect affords by implication a sufficient basis for a private civil suit by the injured party." The principle is well established; however, in our opinion the express language of section 35(d), supra, precludes its application in the instant case.

The pertinent provisions of the cited section read as follows:

> "It shall be unlawful for any registered investment company hereafter to adopt as a part of the name or title of such company, or of any security of which it is the issuer, any word or words WHICH THE COMMISSION FINDS AND BY ORDER DECLARES TO BE DECEPTIVE OR MISLEADING. The Commission is authorized to bring an action in the proper district court of the United States * * * alleging that the name or title of any registered investment company, or of any security which it has issued, is materially deceptive or mislead-

> ing. If the court finds that the Commission's allegations in this respect, taking into consideration the history of the investment company and the length of time which it may have used any such name or title are established, the court shall enjoin such investment company from continuing to use any such name or title." (Emphasis supplied.)

The statutory prohibition is cast in specific terms which may not be disregarded. The section prohibits only the adoption of "any word or words which THE COMMISSION FINDS AND BY ORDER DECLARES to be deceptive or misleading." (Emphasis supplied.) This is a clear expression of Congressional intent that illegality will attach to the conduct of a registered investment company only after such a finding and declaration by the Commission. The authority to enforce the prohibition by appropriate civil action is vested in the Commission.

We are of the opinion that the quoted provision cannot be construed as creating an implied right enforceable in a private civil action. *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174 (1915). The principle announced in the cited case is applicable here. "It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes'." Ibid. See also *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, 378-and 379 (1958). We are of the view that the federal question is not substantial and that under the cases cited in the majority opinion there is no basis for pendent jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 924

WELLINGTON EQUITY FUND, INC., ET AL., PETITIONERS

v.

RALPH J. TAUSSIG, ET UX.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

BLANK, RUDENKO, KLAUS & ROME,
1660 Suburban Station Building,
Philadelphia 3, Penna.,

DARBY & DARBY,
405 Lexington Avenue,
New York 17, N. Y.,
Of Counsel.

North American Building,
Wilmington 1, Del.,

EDWIN P. ROME,
MORRIS L. WEISBERG,

FLOYD H. CREWS,
HARVEY W. MORTIMER,

WILLIAM E. TAYLOR, JR.,

Attorneys for Respondents.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Argument	8
Conclusion	10
Appendix—Judgment of U. S. Court of Appeals, Third Circuit	11

CASES CITED.

	Page
Bell v. Hood, 1946, 327 U. S. 678	7
Levering & Garrigues v. Morrin, 1933, 289 U. S. 103	7
Securities and Exchange Commission v. Insurance Securities Incorporated etc., 9th Cir., 1958, 254 F. 2d 642, certiorari denied, 1958, 358 U. S. 823	9

STATUTES CITED.

	Page
Investment Company Act:	
Section 2(a)(19)	3
Section 2(a)(28)	3
Section 4(3)	3
Section 5(a)(1)	3
Section 5(b)(1)	3
Section 15(a)	3
Section 15(b)	3
Section 35(d)	7
Section 36	9
28 U. S. C. 1254(1)	1

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OPINIONS BELOW.

The opinion of the District Court (452a-527a)[1] is reported at 187 F. Supp. 189. The opinion of the court below is printed as the Appendix to the petition, pages 19-36, and is not yet officially reported.

JURISDICTION.

The judgment[2] of the court below affirming the District Court's[3] order of June 20, 1961 was entered on January 23, 1963. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. 1254(1).

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1. References are to pages of the JOINT AND CONSOLIDATED APPENDIX (3 volumes) printed for the use of the court below. Petitioners have filed nine copies thereof under this Court's Rule 21.

2. The petition omits a copy of the judgment of the court below sought to be reviewed; it is printed as an Appendix *infra*, pages 11-12.

3. The District Court's opinion (452a-527a) is dated August 11, 1960. On June 20, 1961 the District Court granted injunctive relief

QUESTION PRESENTED.

The only question which petitioners seek to proffer (Petition, p. 2) is not involved. Petitioners seek to have this Court exercise its discretionary jurisdiction to review a question not decided by the court below.[4]

STATEMENT OF THE CASE.

This is a shareholders suit brought by two shareholders derivatively on behalf of Wellington Fund, Inc. ("Wellington Fund"), and representatively on behalf of its many shareholders. The court below held that petitioners had unlawfully appropriated the name and goodwill of Wellington Fund; it enjoined petitioners from continuation of unfair competition.

Wellington Fund is a Delaware corporation organized in 1928. Since 1940 it has been an investment company registered under the Investment Company Act. The peti-

(528a-529a). On July 12, 1961 the District Court denied an accounting (530a), and again on July 31, 1961; the District Court's order of July 31, 1961 contains a certification under Federal Rule 54(b) (531a). The three petitioners herein appealed from the District Court's order of June 20, 1961, which appeal became No. 13,702 in the court below. Wellington Fund, Inc. was caused to appeal from the same order, and this appeal became No. 13,703 in the court below. Respondents appealed from the District Court's orders of July 12, and July 31, 1961, which consolidated appeals became Nos. 13,704, and 13,705 in the court below. The court below permitted the filing of a JOINT AND CONSOLIDATED APPENDIX in Nos. 13,702 to 13,705 inclusive.

Respondents are filing a petition for writ of certiorari to review the judgment of the court below entered in Nos. 13,704 and 13,705.

4. The only possible question herein is whether the court below correctly affirmed the determination made by the District Court upon most elaborate findings of fact and conclusions of law that the investment company in question is entitled to the protection afforded by the common law of unfair competition to its corporate name used as a trade name and trade mark. In the court below petitioners did *not* seek to bring themselves within Federal Rule 52(a), and they did not attack any findings of fact or conclusions of law made by the District Court.

tioners are also Delaware corporations; one is also an investment company, incorporated August 26, 1958, and two are corporations owned by Walter L. Morgan. Wellington Equity Fund, Inc. ("Wellington Equity Fund"), petitioner herein, on October 23, 1958 changed from a closed-end to an open-end[5] investment company registered under the Investment Company Act. Petitioner The Wellington Company,—owned by Morgan—is, under contract, the investment adviser[6] and principal underwriter[7] of Wellington Fund, and the principal underwriter of Wellington Equity Fund. Petitioner Wellington Company, Ltd.—owned by Morgan[8]—is, under contract, the investment adviser of Wellington Equity Fund. As of December 31, 1958 Wellington Fund had more than 262,000 shareholders and assets of more than $857,000,000 (453a).[9] Wellington Equity Fund on October 23, 1958 received assets[10] of $33,124,000 after the public sale by a national underwriting syndicate of 3,000,000 shares of its capital stock (801a, 874a).

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5. Wellington Fund and Wellington Equity Fund are management, open-end, diversified investment companies under the Investment Company Act. Sections 4(3), 5(a)(1) and 5(b)(1).

6. Sections 2(a)(19) and 15(a) of the Investment Company Act.

7. Sections 2(a)(28) and 15(b) of the Investment Company Act.

8. In the words of the District Court: "Walter L. Morgan is undeniably the dominant figure in this narrative. He is president and director of each of the defendants. In addition, with respect to defendant [The] Wellington Company, he is the beneficial and record holder of the common stock and substantially all of the preferred stock. He is also beneficial and record holder of substantially all of the outstanding common stock of defendant Wellington [Company] Ltd. and together with members of his family owns a majority of its preferred stock" (526a).

9. Wellington Fund presently has more than 350,000 shareholders, assets of more than $1,400,000,000 and more than 100,000,000 shares outstanding.

10. Wellington Equity Fund presently has assets of about $75,000,000 with more than 5,000,000 shares outstanding, and more than 25,000 shareholders.

In the words of the District Court—"The thrust of plaintiffs' case is simply that Wellington Fund owns the name 'Wellington' and has the right to use that name to the exclusion of all others in the investment company industry" (470a-471a). Petitioners contend, on the other hand, that the Wellington name and its goodwill belong to Morgan (or to petitioner The Wellington Company, solely owned by Morgan).[11] Petitioners espoused in the courts below, and urge upon this Court, the "corporate shell" theory of the nature of Wellington Fund as an investment company. Morgan himself testified with regard to Wellington Fund that ". . . The Fund itself does not amount to anything. The Fund is a corporate shell" (336a).[12] In the courts below (as they now contend in the petition), petioners contended that the Wellington name and the goodwill inherent therein does not relate to any activity of Wellington Fund, but symbolizes rather the business of the investment adviser and principal underwriter of Wellington Fund (471a); that, in reality, Wellington Fund engages in no business activities at all; and that the directors of Wellington Fund have merely the obligations to act as directors of a "corporate shell".[13]

Since, in petitioners' view, Wellington Fund is a "corporate shell", and Wellington Fund's only activities are those of the investment adviser and principal underwriter of Wellington Fund, The Wellington Company, which is owned by Morgan, petitioners urge that only Morgan or

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11. Petitioners' Answer to the complaint asserts that, "To the extent that rights, goodwill and value exist in the name 'Wellington' as it is related to the investment advisory and mutual fund field, the same belong to and enure to the benefit of, the said W. L. Morgan or to defendant The Wellington Company" (43a, ¶ 37).

12. Petitioners argued in the District Court that Wellington Fund ". . . *engages in no activities and is a mere conduit or shell*" (473a, n. 47). (Emphasis added.)

13. Welch, Executive Vice President and director of Wellington Fund, testified that the job of managing Wellington Fund had been *"assigned"* by the board of directors of Wellington Fund to The Wellington Company (125a).

his wholly owned company ". . . have the right to determine the extent to which the name 'Wellington' and any associated names and symbols may be used in the investment advisory and mutual fund field by other persons or corporations" (44a, ¶ 44); that Morgan (or his company) have the *sole* right to endow Wellington Equity Fund with the Wellington name, and such ". . . symbols, literature, format, seals, slogans, and the like as have been used" in connection with the Wellington Fund (45a, ¶ 45). These contentions (reasserted in the present petition), as well as many other contentions (471a), were urged by petitioners upon the District Court. In elaborate findings and conclusions the District Court rejected them all (471a-512a).

The District Court held in substance: that there had been an "overwhelming" and "conclusive" showing of unfair competition and the unlawful appropriation of the Wellington name (486a); that there is ". . . simply no basis in law, or in fact . . ." for petitioners' theory attributing ownership of the name and goodwill of Wellington Fund to The Wellington Company because it happened at the relevant time to be, under contract, the investment adviser and principal underwriter of Wellington Fund (482a); and that the resolution of the Board of Directors of Wellington Fund granting to Wellington Equity Fund the right to use the name Wellington, at a time when *each* director of Wellington Equity Fund was *also* a director of Wellington Fund, at best could ". . . be deemed nothing more than the gift of a valuable corporate asset" belonging to Wellington Fund (503a). In the words of the District Court: "It is properly inferable from the record that defendants intentionally adopted the name 'Wellington Equity Fund' to capitalize on the excellent reputation Wellington Fund enjoys with the investing public" (487a).

The District Court found that, "There is no question, very real advantages accrued . . ." to Morgan and his companies by virtue of affixing the Wellington name to the new investment company (505a); that ". . . it is clear

Wellington Equity Fund intended to poach 'upon the commercial magnetism of the symbol' " (506a). The District Court asserted that it was unwilling ". . . to forsake 262,000 investors with holdings of $858 million in favor of a corporation controlled by one person, Walter L. Morgan, who is also president and director of Wellington Fund" (477a); and that it was unwilling to hold that Wellington Fund with its enormous assets ". . . is the captive of one man, Walter L. Morgan" (479a). The District Court rejected petitioner's contentions, which would, in the words of the District Court, permit them ". . . to function outside the carefully delimited boundaries of corporate law" (477a); the court stated that the "corporate shell" thesis was a mere "sophisticated nuance," and that the investing public should not have ". . . its rights determined by concepts so foreign to established principles" (499a). The District Court asserted that petitioners' very argument, in part, was an admission that ". . . the interests of Wellington Fund are secondary, and those of the closely held management and distribution companies paramount, notwithstanding, that the principals in control of these closely held companies occupy positions requiring the exercise of the highest degree of fidelity to Wellington Fund" (510a).

The District Court's order[14] dated June 20, 1961 (528a-529a) enjoins Wellington Equity Fund from using the Wellington name, and enjoins the Morgan service corporations from using the Wellington name with reference to any investment company *other than* Wellington Fund.

14. The District Court denied respondents' prayer for an accounting of the profits realized by Morgan's service companies from the unfair competition, although the District Court provided for the eventual assessment of costs and counsel fees incurred by respondents upon The Wellington Company and Wellington Company, Ltd. (521a-527a).

Respondents are filing a petition for certiorari which seeks review by this Court of the judgment of the court below which affirms the denial of an accounting in favor of Wellington Fund against the Morgan companies.

Petitioners appealed to the Court of Appeals; on January 23, 1963 it affirmed [15] the District Court's order granting injunctive relief. The Court of Appeals affirmed the judgment of the District Court; in the words of the Court of Appeals the District Court had correctly found, in substance:

> . . . (1) that in the investment company field valuable goodwill attached to and was symbolized by the name "Wellington", (2) that this goodwill was property of Wellington Fund which could not lawfully be appropriated by a new investment company calling itself Wellington Equity Fund and (3) that the consent of the directors of Wellington Fund to this appropriation was invalid. (Appendix to petition, p. 25)

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15. One judge dissented from the determination of the court below that the District Court possessed pendent jurisdiction to decide the common law claim of unfair competition. The majority of the court below held that the federal question presented—whether violations of Section 35(d) of the Investment Company Act of 1940 give rise to an implied civil action—was not "unsubstantial" under the doctrine of *Levering & Garrigues v. Morrin*, 1933, 289 U. S. 103, 105-106; and *Bell v. Hood*, 1946, 327 U. S. 678, 681-683. (Appendix to petition, p. 22.) The dissenting judge did not dissent from the views expressed by the majority of the court in affirming the findings and conclusions of the District Court on the merits of the common law unfair competition claim.

In its brief *amicus curiae* filed in the Court of Appeals, the Securities and Exchange Commission asserted, in part, that private rights of action arise by implication under Section 35(d) of the Investment Company Act; also that the facts that, (1) the Commission has not instituted a proceeding under Section 35(d) of the Act to determine whether "any word or words" in the name of an investment company are "deceptive or misleading", and (2) that the Commission has not objected to proxy material of an investment company,—are not material to a court's determination whether the adoption of a name similar to an existing investment company is actionable under common law concepts of unfair competition, and are not significant in deciding on the merits of a private right of action brought under Section 35(d) of the Investment Company Act.

ARGUMENT.

The only question which petitioners seek to proffer is not involved. When petitioners urged the District Court more than three years ago to decide the very "mutual fund industry" question which petitioners now seek to proffer to this Court, the District Court asserted:

> . . . perhaps this Court in adopting plaintiff's contentions is out of step with a "fourteen billion dollar mutual fund industry." It would, however, be unwise at this time to sit in judgment of the entire industry *and the Court will not attempt to determine any controversy except that which is now before it* (476a-477a). (Emphasis added.)

The District Court, therefore, decided only the question whether petitioners had unlawfully appropriated the name and goodwill of Wellington Fund; the District Court *expressly* did not determine any controversy relating to other investment companies; it determined only the controversy presented by respondents in their complaint relating to Wellington Fund, the corporation in which they are shareholders. The court below affirmed the District Court's determination that petitioners had unlawfully appropriated Wellington Fund's name and goodwill; the court below *necessarily* had before it the only[16] controversy which had been adjudicated by the District Court.

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16. The Investment Company Institute moved the court below for leave to file a brief *amicus curiae*, asserting in part:

> . . . The record of the case on appeal . . . reveals substantial questions of importance to the management investment company industry, involving the relationships of such companies to their shareholders, their investment advisers and their underwriters. . . . It would be the objective of the Institute, if permitted to intervene, to inform the Court of its views on those relationships, based on 20 years experience in the industry. . . .

Petitioners herein urged the court below to grant the said motion of the Investment Company Institute because: "The practice which the Court below has enjoined in this case has been followed in a number

Additionally it is argued by petitioners that "The assumptions as to the nature of the mutual fund industry and the relationship embodied in it which led to the result reached by the Third Circuit are directly contrary to those adopted by the Ninth Circuit . . ." in the case of *Securities and Exchange Commission v. Insurance Securities Incorporated etc.*, 9th Cir., 1958, 254 F. 2d 642, certiorari denied, 1958, 358 U. S. 823. But even petitioners must concede that ". . . the cases are not factually similar" (Petition, p. 6); that case involved the unrelated issue[17] of the sale of stock of an investment adviser and asserted violation of Section 36 of the Investment Company Act.

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of instances in this industry beginning as early as the late 1920's and the early 1930's." The Court of Appeals, however, by order dated October 24, 1961 *denied* the motion. On the same day the Court of Appeals also *denied* the similar motion of the Association of Mutual Fund Plan Sponsors, Inc., for leave to file a brief *amicus curiae*.

The sole question which is proffered by petitioners (Petition, p. 2) relates to an alleged ". . . industry practice of using similar names for two mutual funds . . . which utilize the services of the *same* investment adviser and distributor [principal underwriter] . . .". (Emphasis supplied.) The alleged "industry practice" referred to in the question proffered, is not, however, relevant even with regard to Wellington Fund and Wellington Equity Fund; Wellington Fund and Wellington Equity Fund have never had the *same* investment adviser.

17. The Court of Appeals for the Ninth Circuit framed the question thus, 254 F. 2d at p. 648:

> The specific question presented by appellant's argument is whether transfer of control of an investment adviser and principal underwriter at a price in excess of net asset value constitutes "gross misconduct or gross abuse of trust in respect to" an investment company which it serves, within the meaning of § 36 of the act.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN P. ROME,
MORRIS L. WEISBERG,
FLOYD H. CREWS,
HARVEY W. MORTIMER,
WILLIAM E. TAYLOR, JR.,
Attorneys for Respondents.

APRIL 1963.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 13,702 and 13,703.

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, HIS WIFE, AS TENANTS BY THE ENTIRETIES,

v.

WELLINGTON FUND, INC.,
WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY, AND
WELLINGTON COMPANY, LTD.,
DELAWARE CORPORATIONS.

WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY,
WELLINGTON COMPANY, LTD.,
Appellants in No. 13,702.

WELLINGTON FUND, INC.,
Appellant in No. 13,703.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 20, 1961 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 23, 1963.